Supreme Court, U.S.
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In The

Supreme Court of the United States

THE HUNTINGTON NATIONAL BANK, successor by merger to Huntington Banks of Michigan, et al.,

Petitioners,

v.

MINNESOTA HOTEL COMPANY, INC. and ROBERT E. WOOLLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

Petitioners were creditors who voted in favor of a reorganization plan under Chapter 11 of the Bankruptcy Code. The Disclosure Statement that had been approved by the Bankruptcy Court contained material misrepresentations and omissions which were first discovered by Petitioners after the 180-day limit on revocation of confirmation provided by 11 U.S.C. § 1144. Petitioners filed an action seeking damages and rescission.

The questions presented for review are:

1. Does F.R.Civ. P. Rule 60(b) operate to block an independent action for damages based on fraud committed in the course of a Chapter 11 proceeding – specifically, fraud against other parties and on the court committed by a fiduciary and an officer of the court in obtaining approval of a disclosure statement – because such fraud does not amount to a "grave miscarriage of justice"?

2. Does 11 U.S.C. § 1144 bar a state law-based claim for rescission of a contract that went into effect pursuant to a Chapter 11 plan if the action is filed more than 180 days after entry of the confirmation order, but within the relevant state law statute of limitations?

LIST OF PARTIES

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

Petitioners

1. THE HUNTINGTON NATIONAL BANK, a national banking association organized under the laws of the United States of America, successor by merger to HUNTINGTON BANKS OF MICHIGAN, a state banking organization organized under the laws of the State of Michigan (see Corporate Disclosure Statement infra, page iv). THE HUNTINGTON NATIONAL BANK brings this action in its capacity as Trustee of two trusts: the Grace Henson Trust and the James Henson Trust.

2. PHILLIP M. CORKILL, an individual;

3. ROBERT C.J. HEIMERL, an individual, in his capacity as Trustee of the Heimerl Family Trust;

4. RONALD HENSON, an individual;

5. ROBERT D. KERSLAKE, an individual;

6. DOUGLAS MARTIN, an individual;

7. KAROL K. MORRISON, an individual;

8. M.D. MORRISON, an individual;

9. DAVID W. SCHEIN, an individual; and

10. TIMOTHY J. SMITH, an individual.

LIST OF PARTIES – Continued

Respondents

1. MINNESOTA HOTEL COMPANY, INC., a Texas corportation; and

2. ROBERT E. WOOLLEY, an individual.

Note: Another entity – FELCOR/LAX HOLDINGS, L.P., a Delaware limited partnership – was named as a defendant in the original action. Petitioners have settled with that party, and that party was not a party to the appeal below. Therefore, that entity is not a party "to the proceeding in the court whose judgment is sought to be reviewed" pursuant to Supreme Court Rule 14.1(d).

CORPORATE DISCLOSURE STATEMENT

(Supreme Court Rule 29.6)

HUNTINGTON BANKS OF MICHIGAN was a state banking organization organized under the laws of the State of Michigan. As of approximately June 30, 1997 (after the filing of the Complaint initiating this case), HUNTINGTON BANKS OF MICHIGAN was merged into THE HUNTINGTON NATIONAL BANK, a national banking association organized under the laws of the United States of America. The parent corporation of THE HUNTINGTON NATIONAL BANK, and the former parent corporation of HUNTINGTON BANKS OF MICHIGAN, is HUNTINGTON BANCSHARES, INCORPORATED, an Ohio corporation, which owns 100% of its stock. THE HUNTINGTON NATIONAL BANK brings this action in its capacity as Trustee of two trusts: the Grace Henson Trust and the James Henson Trust.

None of the other Petitioners are corporations.

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Petitioners THE HUNTINGTON NATIONAL BANK, PHILLIP M. CORKILL, ROBERT C.J. HEIMERL, RONALD HENSON, ROBERT D. KERSLAKE, DOUGLAS MARTIN, KAROL K. MORRISON, M.D. MORRISON, DAVID W. SCHEIN and TIMOTHY J. SMITH (collectively "Petitioners") respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 22, 2001.

OPINIONS AND ORDERS BELOW

1. Ninth Circuit Opinion Giving Rise to this Petition

The Opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") that gives rise to this petition was filed on May 22, 2001, and was not officially published. Said Opinion was unofficially reported at 2001 U.S. App. LEXIS 10812, and is reprinted in the Appendix hereto at page A-1.

2. Other Opinions and Orders

The following unpublished orders of the United States District Court for the Central District of California ("District Court") and the United States Bankruptcy Court for the Central District of California ("Bankruptcy Court") are reprinted in the Appendix as indicated:

a. "Order [Minute Order taking Motion for Judgment on the Pleadings off calendar, ordering parties to show cause why action should not be referred to Bankruptcy

Court]" entered by the District Court on October 22, 1997: A-5;

b. "Order [Minute Order transferring action to Bankruptcy Court]" entered by the District Court on December 23, 1997: A-8;

c. "Order Transferring Removed Proceeding to District Court" entered by the Bankruptcy Court on September 11, 1998: A-11;

d. "Order [Minute Order granting Motion for Judgment on the Pleadings]" entered by the District Court on September 18, 1998: A-14;

e. "Order Dismissing Action as to Certain Defendants" entered by the District Court on September 16, 1998: A-17;

f. "Order [Minute Order denying Motion to Alter or Amend Order Dismissing Action as to Certain Defendants]" entered by the District Court on December 1, 1998: A-18;

g. "Stipulation of Dismissal of Defendant Felcor/LAX Holdings, L.P. with Prejudice and Order Thereon" entered by the District Court on October 12, 1999: A-21.

JURISDICTION

The judgment sought to be reviewed was entered on May 22, 2001 by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") (Appendix, page A-1). This Petition is filed within the time limit specified by Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

The following statutes and rules involved in the case are set forth in the Appendix as indicated:

1. 11 U.S.C. § 1125: A-24;
2. 11 U.S.C. § 1144: A-26;
3. F.R.Civ.P. Rule 12(c): A-27;
4. F.R.Civ.P. Rule 60(b): A-27.

STATEMENT OF THE CASE

In the mid-1980s, Petitioners became limited partners of Los Angeles International Airport Hotel Associates, a California Limited Partnership ("LAX-Cal"), paying $75,000 per limited partnership unit. LAX-Cal acquired title to a hotel located near Los Angeles International Airport ("the Hotel"). In 1990, Respondent MINNESOTA HOTEL COMPANY, INC. ("MHC") became the general partner of LAX-Cal. Respondent ROBERT E. WOOLLEY ("Woolley") is the sole shareholder of MHC, and was individually a general partner of LAX-Cal until 1990.

In 1992, LAX-Cal filed a voluntary Chapter 11 petition in the United States Bankruptcy Court, Central District of California, Los Angeles Division. In early 1995, LAX-Cal filed a Fifth Amended Disclosure Statement ("the Disclosure Statement") relating to a Fifth Amended

Plan of Reorganization ("the Plan"). The Disclosure Statement was approved by the Bankruptcy Court on February 28, 1995. In early March 1995, LAX-Cal served the Disclosure Statement and the Plan by mail on the limited partners of LAX-Cal, including Petitioners.

The Disclosure Statement stated that pursuant to the Plan, a capital infusion to LAX-Cal totaling $600,000 would be required, of which the limited partners (including Petitioners) would be liable for 50% (i.e., $300,000) which equated to $750 per limited partnership unit, and MHC as general partner would be liable for the other 50% ($300,000). Pursuant to the Plan, the interests of any limited partners who failed to make their $750 per unit capital contribution would be terminated.

The Disclosure Statement also stated that upon confirmation of the Plan, LAX-Cal would be reconstituted into a Texas limited partnership pursuant to a proposed new "Amended and Restated Agreement of Limited Partnership of Los Angeles International Airport Hotel Associates, a Texas Limited Partnership" (the reconstituted limited partnership is referred to herein as "LAX-Tex").

The Disclosure Statement also stated that the Hotel needed approximately $1 million in renovations beyond the $600,000 capital infusion provided by the Plan. Under the proposed new partnership agreement of LAX-Tex, the limited partners' 50% share of this contemplated future liability would be $500,000, equal to $1,319.26 per unit. The Disclosure Statement included budgets and forecasts showing that even with no capital contribution beyond the $600,000 provided by the Plan, LAX-Tex would post a positive cash flow through 2000.

The Disclosure Statement did not disclose that any additional capital calls were immediately contemplated (beyond the $600,000 sought by the Plan), and did not suggest that any capital calls necessary in the near future would exceed about $1,300 per unit. Further, the Disclosure Statement did not disclose that any sale or transfer of the interest of any general partner of LAX-Cal or LAX-Tex was contemplated, that any withdrawal or substitution of any general partner was contemplated, that any negotiations with any entity regarding transfer of any general partner's interest in LAX-Cal or LAX-Tex were under way or contemplated, or that any change in management of LAX-Cal or LAX-Tex was expected or contemplated.

Petitioners did not object to the Disclosure Statement or to the Plan. Petitioners voted in favor of the Plan, and paid the $750 per unit capital contribution pursuant to the Plan.

On or about September 19, 1995, MHC and Woolley entered into a "Partnership Interests Purchase Agreement" ("the Purchase Agreement") with an affiliate of FELCOR/LAX HOLDINGS, L.P. ("FelCor"). Pursuant to the Purchase Agreement, MHC agreed to sell its partnership interests to the FelCor affiliate. Neither Petitioners nor any of the other limited partners of LAX-Cal were informed of the existence of the Purchase Agreement until May 1996.

The hearing on confirmation of the Plan was held on September 20, 1995; the Plan was confirmed by an order of the Bankruptcy Court entered on October 10, 1995. At

that point, pursuant to the Plan, LAX-Cal was reconstituted into LAX-Tex, and Petitioners each became limited partners of LAX-Tex.

On May 10, 1996, FelCor informed Petitioners and the other limited partners of LAX-Tex that the general and limited partnership interests of MHC and Woolley had been acquired by FelCor effective March 27, 1996, and that FelCor was the new general partner of LAX-Tex. In the same letter with the announcement of such acquisition and change of general partner, FelCor made a capital call to all limited partners of LAX-Tex in the sum of $3,500,000, equal to $9,234.83 per unit.

Petitioners did not tender this capital call. Instead, Petitioners filed the Complaint initiating this case in Superior Court of the State of California, Los Angeles County, on May 9, 1997. The case was removed to the United States District Court, Central District of California, by MHC and Woolley on August 1, 1997.

On October 20, 1997, the District Court considered a motion for judgment on the pleadings filed by MHC and Woolley. At that time, the District Court required the parties to file memoranda stating the parties' positions regarding transfer of the case to the United States Bankruptcy Court, Central District of California. (Appendix, A-5). On December 23, 1997, the District Court entered an Order transferring the case to the Bankruptcy Court. (Appendix, A-8).

On October 30, 1997, MHC filed a Chapter 11 petition in the United States Bankruptcy Court, Northern District of Texas. Appellants and MHC entered into a stipulation in the MHC Chapter 11 case to modify the automatic stay

to allow this case to proceed. An Order approving that stipulation was entered by the Bankruptcy Court (Northern District of Texas) on March 30, 1998.

On May 12, 1998, the Bankruptcy Court (Central District of California) scheduled a Status Conference and issued an "Order to Show Cause re Remand or Transfer." Following a hearing on July 7, 1998, the Bankruptcy Court transferred this case back to the District Court on July 17, 1998. (Appendix, A-11).

On August 20, 1998, MHC and Woolley filed a renewed "Motion for Judgment on the Pleadings." The District Court heard that Motion on September 14, 1998, and granted the Motion by its Minute Order of September 14, 1998 (Appendix, A-14) and its "Order Dismissing Action as to Certain Defendants" entered September 16, 1998 ("Dismissal Order I"). (Appendix, A-17).

Petitioners timely filed a motion to alter or amend Dismissal Order I on September 30, 1998. The District Court denied that motion by order entered December 1, 1998. (Appendix, A-18).

Thereafter, Petitioners entered into a settlement with sole remaining Defendant FelCor. An order dismissing FelCor pursuant to stipulation was entered on October 12, 1999. (Appendix, A-21).

On November 10, 1999, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The appeal was argued to the Ninth Circuit on May 7, 2001. On May 22, 2001, the Ninth Circuit filed

its Memorandum affirming the decision of the District Court. (Appendix, A-1).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Memorandum Decides an Important Question of Federal Law That Has Not Been, But Should Be, Settled by This Court.

Certiorari is appropriate when a Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10(c). When the question is recurring and the case involves principles the settlement of which is of importance to the public, certiorari should be granted. *See, e.g., Donaldson v. United States,* 400 U.S. 517 (1971); *United States v. Zacks,* 375 U.S. 59 (1963). This principle applies in matters concerning bankruptcy law. *See, e.g., United States v. Noland,* 517 U.S. 535 (1996).

The decision of the Ninth Circuit recognized that the misrepresentations and omissions contained in the Disclosure Statement were material enough to survive a motion under F.R.Civ.P. Rule 12(c), and that the Complaint stated a claim for fraud. Nonetheless, the Ninth Circuit concluded that the damages claims asserted by Petitioners are barred by F.R.Civ.P. Rule 60(b).

F.R.Civ.P. Rule 60(b)(6) provides for relief from a judgment or order, and expressly references an independent action as a mechanism for such relief. The question of under what circumstances an independent action may be brought to set aside a prior order or judgment that was

procured by fraud is a recurrent issue that should be resolved by this Court.

The sole case relied upon for its decision by the Ninth Circuit was *United States v. Beggerly,* 524 U.S. 38 (1998). In that case, the central allegation was that the government had failed to thoroughly research its records in a quiet title action. This Court held that an independent action to set aside an order or judgment could theoretically proceed under F.R.Civ.P. Rule 60(b)(6). Under the facts of that case, however, this Court found that the negligence alleged did not present the type of "grave miscarriage of justice" necessary to maintain an independent action, and that accordingly a 12-year statute of limitations applicable to quiet title proceedings was not tolled. In *Beggerly,* neither fraud nor misrepresentation was alleged. Here, fraud and misrepresentation are clearly alleged.

A long line of cases holds that for purposes of relief under F.R.Civ.P. Rule 60(b)(6) based on fraud, the fraud alleged must be "fraud upon the court." Fraud upon the court is committed when an officer of the court perpetrates a misrepresentation affecting the ability of the court to impartially judge a case. *Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.,* 98 F.3d 640 (D.C. Cir. 1996); *Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320 (2nd Cir. 1995); *Pumphrey v. K.W. Thompson Tool Co.,* 62 F.3d 1128 (9th Cir. 1995).

Here, the false and misleading Disclosure Statement was prepared and advocated by LAX-Cal as debtor-in-possession, an office of the court imbued with the duties of a trustee pursuant to 11 U.S.C. § 1107. A debtor-in-

possession, no less than a trustee, is an officer of the Bankruptcy Court and a fiduciary to all creditors. *In re March*, 995 F.2d 32 (4th Cir. 1993); *In re Grabill Corp.*, 113 Bankr. 1996 (Bankr. N.D. Ill 1990), *aff'd* 135 Bankr. 835 (N.D. 1991), *aff'd* 1983 F.2d 773 (7th Cir. 1993); *Power-Pak Products, Inc. v. Royal Globe Ins. Co.*, 433 F.Supp. 684 (W.D.N.Y. 1997); *In re Penick Pharm.*, 227 Bankr. 229 (Bankr. S.D.N.Y. 1998).

F.R.Civ.P. Rule 60(b) expressly states that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . or to set aside a judgment for fraud upon the court." *See also, In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991). The fraud alleged here is legally indistinguishable from that alleged in *Intermagnetics*: both cases were actions for damages based on misrepresentations and omissions in seeking Bankruptcy Court approval (there of a sale, here of a plan), and were commenced after the relevant orders had been entered and were final.

By ruling that the fraud allegations here do not meet the standard necessary for Rule 60(b)(6) relief, the Ninth Circuit's decision here indicates that fraud committed by a debtor-in-possession in a disclosure statement and plan confirmation process is not fraud upon the court. Such a holding is contrary to well-established principles concerning material misrepresentations and omissions made by an officer of the court, and the status of debtors-in-possession as officers of the court, as described above.

When allegations of fraud on the court are made as a basis for an independent action for relief from a prior

judgment, the issue of whether the fraud was egregious enough to support Rule 60(b)(6) relief is always a question of fact, and cannot be decided on a motion to dismiss. *In re Willard*, 240 Bankr. 664 (Bankr. D. Ct. 1999); *In re Clinton Street Food Corp.*, 254 Bankr. 523 (Bankr. S.D.N.Y. 2000); *In re R&R Associates of Hampton*, 248 Bankr. 1 (Bankr. D.N.H. 2000). Accordingly, given the Ninth Circuit's ruling that the misrepresentations and omissions in the Disclosure Statement were material enough to survive a Rule 12(c) motion, the conclusion (on a Rule 12(c) motion) that relief is unavailable pursuant to Rule 60(b)(6) represents a significant departure from accepted standards in considering allegations of fraud in judicial proceedings committed by officers of the court.

The Ninth Circuit did not address any tests for determining whether Rule 60(b) relief was available beyond the "grave miscarriage of justice" threshold stated in *Beggerly*. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this Court affirmed a Fifth Circuit decision vacating a judgment under Rule 60(b)(6), because of the appearance of impropriety in that the judge should have known facts sufficient to disqualify the judge pursuant to 28 U.S.C. § 455(a). This Court held that in determining whether a § 455(a) violation requires relief under Rule 60(b)(6) "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 863.

Petitioners submit that the same three factors may appropriately be used to assess whether a violation of 11 U.S.C. § 1125 by a debtor-in-possession (an officer of the

court under 11 U.S.C. § 1107) requires relief under Rule 60(b)(6). The factors identified in *Liljeberg* are met here. The risk of injustice to the particular parties is a certainty; without such relief, Respondents will have achieved their goal of deceiving the limited partners and the court into confirming the plan, and Petitioners will have lost their investment and their damages claims. The denial of relief here will likely produce injustice in other cases, since the lesson to be learned from this case (if the Ninth Circuit decision stands) is that fraud in the course of a Chapter 11 disclosure statement and plan confirmation process is only actionable if it is discovered within six months of the confirmation order. Finally, the public's confidence in the judicial process will be undermined if an officer of the court, and the persons in control of it, are allowed to achieve confirmation of a Chapter 11 plan by misrepresentations, and then keep the fruits of their misrepresentations simply because they were able to conceal the facts for 181 days after entry of the confirmation order.

On this basis, Petitioners submit that to allow the fraud alleged here to stand unredressed would work a "grave miscarriage of justice." The false and misleading Disclosure Statement was prepared and advocated by LAX-Cal as an officer of the court and a fiduciary to creditors. Respondents were the persons in control of LAX-Cal. By presenting the false Disclosure Statement to the bankruptcy court and the creditors, the Respondents prevented the bankruptcy court and the creditors from dealing head-on with the general partner's secret deal to cash out and with the need for a massive capital infusion shortly after confirmation. Petitioners (and numerous others) were duped into supporting the Plan (and paying

for the privilege to do so) when, if the truth were known, they would have actively opposed the plan (or at least not invested further). Petitioners lost not only their original $75,000 per unit investment, but the protections of the more-favorable LAX-Cal Partnership Agreement, and they paid $750 per unit as well. This situation is far more egregious than the simple failure to search records alleged in *Beggerly*. If this is not a "grave miscarriage of justice," then the *Beggerly* standard must be capable of being met only in capital cases. A more complete statement of that standard by this Court is necessary to avoid the kind of inconsistency in the treatment of fraud claims by the federal courts exemplified by the comparison of this case with the cases cited above.

II. The Ninth Circuit's Memorandum Is Inconsistent with Holdings of this Court which Prohibit Lower Courts from Reading Additional Restrictions into the Plain Language of Statutes to Achieve "Policy" Objectives

Certiorari is appropriate when it appears that a decision of a Court of Appeals may be inconsistent with relevant prior decisions of this Court. Supreme Court Rule 10(c). *See, Pure Oil v. Suarez*, 384 U.S. 202 (1966); *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 376 U.S. 492, *on remand*, 332 F.2d 563, *mot. granted*, 377 U.S. 974 (1964).

Even if this Court has not previously addressed the precise legal issue involved below, certiorari is appropriate when a Court of Appeals makes a ruling which is inconsistent with principles applicable to the matter

under prior decisions of this Court. *Parsons v. Smith*, 359 U.S. 215 (1959).

If the Court of Appeals appears to have misinterpreted prior Supreme Court decisions, certiorari is appropriate. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103, *reh'g denied*, 358 U.S. 942 (1958).

Here, the Ninth Circuit's decision is utterly inconsistent with repeated holdings of this Court which prohibit all courts from reading additional requirements and restrictions into the plain language of unambiguous statutes to achieve desired policy objectives.

11 U.S.C. § 1144 is concise. It provides as follows:

> "On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall –
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
>
> (2) revoke the discharge of the debtor."

The statute is clear on its face that an order confirming a plan may be revoked only if the order was procured by fraud, and only if the motion seeking revocation is filed within 180 days of the confirmation order. Section 1144 cannot be read to set a limitation period, or other requirement, on remedies other than revocation of a confirmation order. Specifically, § 1144 contains no language

addressing state law claims for damages or rescission of a contract.

Other courts have allowed claims for relief other than revocation of confirmation to be pursued after the expiration of the 180 days afforded by § 1144. *See, e.g., In re The Circle K Corporation,* 181 Bankr. 456 (Bankr. D. Az. 1995) (post-confirmation claim for damages for fraud in confirmation proceeding); *In re Coffee Cupboard, Inc.,* 119 Bankr. 14 (E.D.N.Y. 1990) (post-confirmation motion to convert Chapter 11 case to Chapter 7 based on concealment and perjury). The same facts that give rise to a claim for revocation of confirmation may also constitute a basis for other relief, such as damages. *In re Tenn-Fla Partners,* 170 Bankr. 946 (Bankr. W.D. Tn. 1994), *aff'd* 229 Bankr. 720 (W.D. Tn. 1999), *aff'd* 226 F.3d 746 (6th Cir. 2000).

The position asserted by MHC and Woolley, and adopted as law by the district court, is that a Chapter 11 plan confirmation order – even one obtained by means of material omissions and misrepresentations – precludes all claims for damages by creditors who were duped in the confirmation process, after the confirmation order has aged for six months. The Ninth Circuit implicitly acknowledged that the damage claims asserted in Petitioners' complaint were not affected by § 1144 (effectively reversing the district court on this point). However, the Ninth Circuit found that the claim for rescission of the LAX-Tex Partnership Agreement (which was stated in the complaint as a separate cause of action) was tantamount to seeking revocation of confirmation, and was therefore time-barred by § 1144. (Appendix, A-3). In other words, the Ninth Circuit considered itself free to find an additional implied restriction on the exercise of state law

rights which is not contained in the express language of § 1144.

This Court has repeatedly admonished lower courts not to read additional requirements into the plain language of statutes to achieve some purported "policy" objective. When the governing statute is clear and unambiguous on its face, it should be applied as written, unless such a reading would "produce a result 'demonstrably at odds with the intentions of its drafters.' " *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *United States v. Locke*, 471 U.S. 84, 93 (1985). This principle – the plain, unambiguous language of a constitutionally permissible statute is conclusive in the absence of a clearly expressed legislative intent to the contrary – applies in Bankruptcy Code matters. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-242 (1989); *United States v. Noland*, 517 U.S. 535 (1996); *In re Bonner Mall Partnership*, 2 F.3d 899, 908 (9th Cir. 1993), *cert. granted, sub nom. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 510 U.S. 1039 (1994), *motion to vacate denied, case dism'd as moot*, 513 U.S. 18 (1994).

Here, the constitutionality of 11 U.S.C. § 1144 is not in question. The issue is whether § 1144 contains an unwritten, subliminal restriction on state law rights to seek rescission of contracts for fraud, in addition to its express restriction on seeking revocation of a confirmed plan. No sound basis for reading such a requirement into § 1144 exists.

In *Union Bank v. Wolas*, 502 U.S. 151 (1991), this Court unanimously reversed the Ninth Circuit under the principles stated in *Locke* and *Ron Pair*, in a situation logically

similar to that presented here. In that case, a Chapter 7 trustee filed a complaint under 11 U.S.C. § 547(b) against a bank to recover payment made by the debtor to the bank during the 90-day period preceding the filing of the petition. The bank argued that the payments were made in the ordinary course of business pursuant to § 547(c)(2), and were thus excepted from § 547(b). The Bankruptcy Court agreed with the bank, and the District Court affirmed, but the Ninth Circuit reversed, holding that the "ordinary course of business" exception provided by § 547(c)(2) was applicable only to short-term debt, not long-term debt. This Court reversed, holding that *the plain meaning of the statute controlled*, as follows:

> "The most significant feature of [11 U.S.C. § 547(c)(2)] that is relevant to this case is *the absence of any language* distinguishing between long-term debt and short-term debt. . . . Thus, the text provides no support for respondent's contention that § 547(c)(2)'s coverage is limited to short-term debt, such as commercial paper or trade debt. *Given the clarity of the statutory text, respondent's burden of persuading us that Congress intended to create or to preserve a special rule* for long-term debt *is exceptionally heavy.*" (Emphasis added) 502 U.S. at 155-156.

Reviewing the legislative history of 11 U.S.C. § 547, this Court again focused on the unambiguous language of the statute:

> "[E]ven if Congress adopted the 1984 amendment to redress particular problems of specific short-term creditors, it remains true that Congress redressed those problems by entirely deleting the time limitation in § 547(c)(2). The fact that Congress may not have foreseen all of

> the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." 502 U.S. at 157-158.

Accordingly, the Ninth Circuit here should have gone no further than the unambiguous plain meaning of the language of 11 U.S.C. § 1144. If Congress had intended § 1144 to apply to proceedings other than motions to revoke confirmation, Congress could easily have written the statute to divest parties of all state law claims that bear some similarities to revocation of confirmation. Congress did not do so. The conclusion is therefore inescapable that § 1144 means exactly what it says, and no more.

No clear justification was offered by the Ninth Circuit for its deviation from the plain language of the statute. From the Memorandum, it appears that the Ninth Circuit acted on the basis of its policy preference to restrict a state law right – rescission of a contract for fraud pursuant to California Civil Code §§ 1689 and 1692 – on the basis of a time limitation which, by its express language, does not apply to such a claim. The Ninth Circuit's holding was in direct contravention of this Court's admonitions in *Locke, Ron Pair,* and *Union Bank* to eschew judicial legislation. Certiorari is therefore appropriate.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 20, 2001

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUNTINGTON BANKS OF MICHIGAN, a state banking organization, as Trustee of the Grace Henson Trust and as Trustee of the James Henson Trust; PHILIP M. CORKILL; ROBERT C. J. HEIMERL, an individual as Trustee of Heimerl Family Trust; RONALD HENSON; ROBERT D. KERSLAKE; DOUGLAS MARTIN, an individual; KAROL K. MORRISON, an individual; DAVID W. SCHEIN, an individual; TIMOTHY J. SMITH, an indivudual [sic],

Plaintiffs-Appellants,

v.

FELCOR/LAX HOLDINGS L P, a Delaware limited partnership,

Defendant-Appellee,

and

MINNESOTA HOTEL COMPANY INC., a Texas corporation; ROBERT WOOLEY, an individual,

Defendants.

No. 99-56963

D.C. No. CV 97-05736-HLH(CMW)

MEMORANDUM*

(Filed May 22, 2001)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted May 7, 2001
Pasadena, California

Before: MAGILL**, McKEOWN and FISHER, Circuit Judges.

The materiality of alleged omissions and misrepresentations in a Disclosure Statement are "measured by an objective standard drawn from the definition of 'adequate information' at § 1125(a) that asks what the 'hypothetical reasonable investor typical of holders of claims or interests of the relevant class' would want to know in order to make an informed judgment about the plan." *Official Comm. of Unsecured Creditors v. Michelson (In re Michelson)*, 141 B.R. 715, 725 (Bankr. E.D. Cal. 1992) (quoting 11 U.S.C. § 1125(a)). Under this standard, Appellants are correct that knowledge of the founder and general partner's intent to cash out immediately following confirmation of the Plan might reasonably have influenced their decision whether to approve the Plan. The possibility that the general partner might assign its interests at some point in the indeterminate future is distinctly different from the certainty that such a transfer is about to occur.

The capital call presents a closer question. Appellants were undoubtedly on notice that a capital call could – and very likely would – be expected of them. Because a court might well have determined that the anticipated

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** The Honorable Frank J. Magill, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

magnitude of that call was a material factor, however, the allegation relating to the call is sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(c).

Even though the Complaint states a claim for fraud, Appellants' action is blocked by statutory obstacles. Section 1144's six-month time limit to file actions seeking revocation of a Plan is absolute, and no motion for revocation may be filed once the period has expired, regardless of the circumstances. *Farley v. Coffee Cupboard, Inc. (In re Coffee Cupboard, Inc.)*, 119 B.R. 14, 19 (E.D.N.Y. 1990). In determining whether § 1144 bars an action, "courts look carefully at the cause of action and requested relief to determine if plaintiff is seeking to revoke confirmation or 'redivide the pie.' " *S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.)*, 181 B.R. 457, 462 (Bankr. D. Ariz. 1995). To the extent Appellants seek rescission of the LAX-Tex Agreement, their claim is an attempt to revoke the confirmation of the Plan, and is therefore barred.

Rule 60 prevents Appellants from bringing the remainder of their claim. Because the bankruptcy court found that the Disclosure Statement was acceptable, any action challenging it must meet the requirements for relief from a judgment or order contained in Fed. R. Civ. P. 60(b). Appellants would therefore only be entitled to pursue their claim if it were an "independent action," as that term is used in Rule 60. Under *United States v. Beggerly*, 524 U.S. 38 (1998), however, independent actions are "available only to prevent a grave miscarriage of justice." *Id.* at 47. Appellants' fraud allegations do not meet that standard. Because Rule 60 provides Appellants

no grounds to surmount the bankruptcy court's earlier rulings, their action is barred.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 97-5736 HLH (CWx) Date October 20, 1997

Title Huntington Banks, et al. v. Felcor, Minnesota Hotel Company, RObert Woolley et al

DOCKET ENTRY

TENTATIVE RULING

PRESENT:

HON. HARRY L. HUPP,
JUDGE

Maynor R. Galvez
Deputy Clerk

Cynthia L. Mizell
Court Recorder

ATTORNEYS PRESENT FOR PLAINTIFFS:
Mark T. Young

ATTORNEYS PRESENT FOR DEFENDANTS:
Michael Collins
Jay D. Sanders

PROCEEDINGS: MOTION FOR JUDGMENT ON THE PLEADINGS

ORDER (also, if applicable, findings and memorandum opinion):

The motion for judgment on the pleadings of defendants Minnesota Hotel Co. and Wooley are placed off calendar subject to being reset here if this court retains jurisdiction over this case or in the Bankruptcy Court if it does not. Both parties are ordered to show cause in writing by Nov. 3, 1997, why this action should not be

treated as an adversary action or other bankruptcy proceeding related to bankruptcy action #LA 92-39324 AA and referred to the Bankruptcy Court for all further proceedings.

The way this action is brought may show up some conundrums in the law, but they are conundrums in bankruptcy law. The essence of plaintiffs' complaint is that there was fraud in the disclosure statements which led to the approval of a plan of reorganization. However, plaintiffs complain that their remedy for this in the Bankruptcy Code was to bring an action under § 1444 within 6 months in the Bankruptcy Court to revoke or amend the plan of reorganization, and that this fraud was not discovered or discoverable until 7 months had passed. In this action, plaintiffs seek damages against the former debtor in possession for the misrepresentation to the Bankruptcy Court (and the plaintiffs).

Numerous legal problems are posed by these theories and there does not seem to be a plethora of clear answers. However, one thing jumps off the paper – the alleged fraud was committed in a bankruptcy proceeding and is alleged to have affected the order made by the Bankruptcy Court. It may be that the complaint is akin to one alleging extrinsic or intrinsic fraud in the obtaining of a judgment allowing an equitable proceeding to set aside the judgment. The allegations of the complaint are of direct and immediate relevance to the procedures used in the Bankruptcy Court. Accordingly, the court's tentative thought is to refer the matter to the Bankruptcy Court to be treated as a part of the former bankruptcy litigation.

Counsel are asked to comment on the above points, including comment on the jurisdiction of the Bankruptcy Court if the matter should be transferred there.

Plaintiffs should forthwith require the absent defendant to answer or to get its default entered.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV97-5736-HLH (CWx) Date December 22, 1997

Title Huntington Banks, et al. v. Felcor, Minnesota Hotel Company, Robert Woolley, et al.

DOCKET ENTRY (Entered Dec. 23, 1997)

PRESENT:

HON. HARRY L. HUPP,
JUDGE

Maynor R. Galvez	Cynthia L. Mizell
Deputy Clerk	Court Recorder

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS:

ORDER (also, if applicable, findings and memorandum opinion):

This entire action, including the claims against defendant Felcor/LAX Holdings (hereafter Felcor) is transferred to the bankruptcy court of this district for all further proceedings.

The parties agree that the claims against defendants Minnesota Hotel Company (MHC) and Wooley are within the jurisdiction of the bankruptcy court and that those claims, in the court's discretion, may be transferred to the bankruptcy court or retained by this court. Plaintiff takes

the position that the claim against Felcor also has bankruptcy jurisdiction as "related to" a bankruptcy proceeding. Felcor takes the position that there is no bankruptcy court jurisdiction. MHC and Wooley take the position that the claims against them should be transferred to the bankruptcy court with the claims against Felcor stayed pending resolution. This action arose out of a plan of reorganization in which an essential step was the formation of a new limited partnership. The terms of the old and new partnership provided for additional capital contributions by the limited parnters [sic] on the call of the general partner. If the contributions were not made, the limited partnership interest was revoked. The disclosure statement estimated that an additional capital contribution of $600,000 was needed from the limited partners to the new partnership, which was made by plaintiffs. Plaintiffs allege that the general partnership was sold to Felcor, who, 7 months later, put out a capital call for $3,500.000 [sic].

Plaintiffs allege that there was fraud in the disclosure statement. Plaintiffs also seek to rescind the agreement that the old limited partnerships be transferred to the new limited partnership.

In the court's opinion, it is the rescission claim which makes the claims against Felcor "related to" the claims against MHC and Wooley. If plaintiff is correct and there was fraud sufficient to set aside the provision in the plan transferring the assets to the new limited partnership, followed by sale of the general partnership interest to Felcor, then Felcor would be directly affected by the recission judgment. (This is not true of the damage claims against Felcor, since it alleges facts outside the scope of

the bankruptcy proceedings). The court concludes that the bankruptcy court has jurisdiction of the claims against Felcor pursuant to 28 USC §1334(4). It is determined that the entire action should be transferred to the bankruptcy court rather than split it into 2 parts.

Counsel inform the court that two things have happened which may complicate the transfer. First, apparently the bankruptcy proceedings have been terminated with a final order. Second, MHC has filed a Chapter 11 proceeding in the Northern District of Texas. The parties have not commented on what effect these facts would have, if any, on the jurisdiction of the bankruptcy court. This court will not embark on that inquiry, but will leave it to the bankruptcy court. If the bankruptcy court determines that it has no jurisdiction because of the termination of the Chapter 11 proceeding or a complication rising out of the Texas Chapter 11 proceeding of MHCV, it may is [sic] its discretion transfer the action back to this court.

cc: Hon Alan Ahart
(as related to case LA-92-39324 AA)

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

CV 97-5736HLH (CWx)

In re LOS ANGELES INTERNATIONAL AIRPORT HOTEL ASSOCIATES, a California limited partnership, Debtor.	Case No. LA 92-39324-AA Adv. No. 97-04027-AA Chapter 11 ~~[PROPOSED]~~ ORDER TRANSFERRING REMOVED PROCEEDING TO DISTRICT COURT DATE: July 7, 1998 TIME: 10:30 a.m. Place: Courtroom 1375 (FILED JUL 16 1998)
HUNTINGTON BANKS OF MICHIGAN, et al., Plaintiffs, v. FELCOR/LAX HOLDINGS, L.P., et al., Defendant.	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On July 7, 1998 at 10:30 a.m. a hearing was held in the above-captioned Court, the Honorable Alan M. Ahart presiding, on the Court's Order to Show Cause Re Remand or Transfer. Plaintiffs Huntington Banks of Michigan, et al. were represented by counsel Mark T. Young, defendant FelCor/LAX Holdings, L.P. was represented by counsel Judith B. Gitterman of Jenkens & Gilchrist, Solish, Arbiter & Gehring, and defendants Minnesota Hotel Company, Inc. and Robert E. Woolley were represented by Jay D. Sanders of Loeb & Loeb, LLP. Scott Clarkson, attorney for the debtor in the bankruptcy case, *In re Los Angeles International Hotels Associates, a California limited partnership,* also appeared.

The Court, having considered all of the pleadings and papers on file and argument of counsel, and GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that the removed proceeding be transferred back to Judge Henry L. Hupp of the United States District Court for the Central District of California, Case No. CV 97-5736-HLH (CWx).

DATED: 7/16/98 /s/ Alan M. Ahart
UNITED STATES
BANKRUPTCY JUDGE

SUBMITTED BY:

/s/ Judith B. Gitterman
JUDITH B. GITTERMAN of Jenkins & Gilchrist,
Solish, Arbiter & Gehring
Attorneys for Defendant,
FELCOR/LAX HOLDINGS, L.P.

I hereby attest and certify on 9/11/98 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody [SEAL]

CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
By /s/ [Illegible] Deputy

APPROVED AS TO FORM:

/s/ Mark T. Young
MARK T. YOUNG
Attorney for Plaintiffs,
HUNTINGTON BANKS OF MICHIGAN, et al.

/s/ Scott C. Clarkson
SCOTT C. CLARKSON of Clarkson, Gore & Marsella
Attorneys for Reorganized Debtor, LOS ANGELES INTERNATIONAL AIRPORT ASSOCIATES

/s/ Jay Sanders
JAY D. SANDERS of Loeb & Loeb, LLP
Attorneys for Defendants, MINNESOTA HOTEL COMPANY; ROBERT E. WOOLLEY

CIVIL MINUTES – GENERAL

No. CV 97-5736 HLH (CWx) DATE September 14, 1998

Huntington Banks of Michigan, et al. v.
Felcor/LAX Holdings, et al.

DOCKET ENTRY

TENATIVE RULING

PRESENT:

HON. HARRY L. HUPP, JUDGE

Maynor R. Galvez
Deputy Clerk

Cynthia L. Mizell
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Mark T. Young

ATTORNEYS PRESENT FOR DEFENDANTS:
Jay D. Sanders

PROCEEDINGS: Motion for Judgment on the Pleadings – Rule 12(c) Request for Judicial Notice

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ORDER (also, if applicable, findings and memorandum opinion):

The motion for judgment on the pleadings by defendant Minnesota Hotel Company, Inc. and Robert E. Wooley (hereafter collectively MHC) is granted without leave to amend and the action is dismissed as to those defendants by order signed and filed this date.

Judicial notice is taken of the items requested by moving defendants.

This action was transferred to the Bankruptcy Court last December, but retransferred to this court last July.

This is a fraud action arising out of a bankruptcy case. Plaintiff alleges that MHC, who was general partner of the debtor in possession in a Chapter 11 bankruptcy proceeding, made fraudulent representations in the disclosure statement which preceded the approval of the plan of reorganization. Plaintiff's principal legal problem in that the bankruptcy act has a six month limitation period to bring a bankruptcy action to set aside an order obtained by fraud (11 USC § 1144), and this action was brought about twenty months after confirmation of the plan of reorganization.

Plaintiff also has an additional problem, which he apparently has not recognized. Whether his attack is on the disclosure statement, which was approved by the bankruptcy court, or on the approved plan of reorganization, he nevertheless must set aside the judgment of the bankruptcy court, which found the disclosure statement "adequate", and the plan of reorganization premised on that disclosure statement. For the reasons stated in the previous paragraph, he cannot now move for this to be done in the bankruptcy court (and possibly for the additional reason that there is now no pending proceeding in the bankruptcy court).

While it is not impossible to set aside a judgment for fraud in an independent action in equity, such an order must be based on a theory of "extrinsic fraud", as opposed to "intrinsic fraud". The fraud alleged here is purely "intrinsic fraud" and the facts pleaded make it

clear that no "extrinisic fraud" can be alleged (*Wood v. McEwen* 9Cir'81 644 F2d 797).

Basically, intrinsic fraud, the classic case of which is perjured testimony, takes place in the proceeding itself. It is not a possible basis for setting aside a judgment since the parties are expected to show the truth and expose fraud before the judgment is granted or be foreclosed on *res judicata* reasoning. Such is the nature of the fraud here wherein MHC is alleged to have failed to reveal its intentions when it filed its disclosure statement and obtained approval of the plan of reorganization. This is not and cannot be the basis of a separate suit in equity to set aside the judgment. Thus, once the 6 months limitations period expires, intrinsic fraud is irrelevant.

Extrinsic fraud is where the alleged fraudulent party takes steps to prevent a party from litigating the case on the merits (*Green* 9Cir'78 577 F2d 1380). No such facts are alleged here and the statement of the allegations of the complaint are such as to negative extrinsic fraud. Accordingly, the motion for judgment on the pleadings is granted without leave to amend and the action is dismissed as to the MHC defendants.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUNTINGTON BANKS OF MICHIGAN, et al., Plaintiffs, v. FELCOR/LAX HOLDINGS, et al., Defendants.	No. CV97-5736-HLH (CWx) ORDER DISMISSING ACTION AS TO CERTAIN DEFENDANTS (Filed Sep. 14, 1998)

This action is dismissed, with prejudice, as to defendants Minnesota Hotel Company, Inc. and Robert E. Wooley.

This Order is a final judgment for purposes of Fed.R.Civ.P. 54(a). It shall be entered pursuant to Fed.R.Civ.P. 58 and 79(a), and served upon the parties.

IT IS SO ORDERED.

Date: September 14, 1998.

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 97-5736 HLH (CWx) Date November 23, 1998

Title HUNTINGTON BANKS OF MICH., et al v. FELCOR/LAX HOLDINGS, et. al

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DOCKET ENTRY

PRESENT

HON. HARRY L. HUPP, JUDGE

Maynor R. Galvez	**Cynthia L. Mizell**
Deputy Clerk	**Court Recorder**

ATTORNEYS PRESENT FOR PLAINTIFFS:
Mark T. Young √

ATTORNEYS PRESENT FOR DEFENDANTS:
Douglas E. Mirell
William A. Brewer
J. Sanders √
R. Phillips √

PROCEEDINGS: PLAINTIFF'S MOTION TO ALTER OR AMEND "ORDER DISMISSING ACTION AS TO CERTAIN DEFENDANTS"

ORDER (also, if applicable, findings and memorandum opinion):

The motion of plaintiffs to reconsider the order of Sept. 14, 1998, is denied.

This motion is entitled a motion "to alter or amend 'order dismissing action as to certain defendants' ". However, it is in reality a motion to reconsider the order of Sept. 14, 1998, and, thus, comes under Local Rule 7.16, which requires that there be new evidence not available before or failure of the court to consider material facts. Neither are present here.

Plaintiffs argue, as they did at the time of the original motion, that they do not seek to set aside the judgment of the bankruptcy court approving the plan of reorganization or the predecessor order approving the disclosure statement. If plaintiffs really mean that, then their case is doomed by the doctrine of res judicata, since they cannot raise items previously adjudicated against them without setting aside the previous determination.

Plaintiffs also argue that the court "sprung" the doctrine of extrinsic fraud upon them without allowing briefing. It is difficult to believe that so obvious a point was not fully known to all counsel. However, the court has looked at plaintiffs' brief on this motion to see if anything new is contained therein. One of plaintiffs' difficulties is that there is a difference between the fraud necessary to set aside a judgment within a year under FRCP 60(b) or an order approving a plan of reorganization under 11 USC § 1144 than what is necessary to do so in an independent action in equity after the end of the 12 month, or 6 month, period respectively. For motions under Rule 60(b), allowing an attack for a year after the judgment, the difference between intrinsic and extrinsic fraud has been expressly abolished, so that a judgment may be set aside for mistake, inadvertence, surprise, excusable

neglect, or fraud. Once the year expires, plaintiff is relegated to an independent action in equity to set aside the judgment. The traditional limitation on those actions is the intrinsic-extrinsic doctrine which has as its principal purpose the finality of judgments. The cases cited by plaintiffs do not compel a different result. In *in re Hunter* 9Cir'66 F3d 1002, 1005, the Court of Appeals in dicta did indeed question the doctrine in passing, but declined to rule on it since there was no federal jurisdiction in any event. This court believes that on further reflection, the Court of Appeals would have recognized the difference between Rule 60 treatment and an independent action in equity, and maintained the traditional rule. In *In re Intermagnetics* 9Cir'91 926 F2d 912, the court was dealing with a different animal than presented here – an allegation of "fraud on the court", not applicable here.

There is no basis for reconsideration and the motion is denied.

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Attorneys for Defendant
FELCOR/LAX HOLDINGS, L.P.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUNTINGTON BANKS OF MICHIGAN, a State Banking Organization, as Trustee of the Grace Henson Trust and as Trustee of The James Henson Trust; PHILIP M. CORKILL, an individual; ROBERT C.J. HEIMERL, an individual, as Trustee of Heimerl Family Trust; RONALD HENSON, an individual; ROBERT D. KERSLAKE, an individual; DOUGLAS MARTIN, an individual; M.D. MORRISON, an individual; KAROL K. MORRISON, an individual; DAVID W. SCHEIN, an individual; and TIMOTHY J. SMITH, an individual, Plaintiffs, vs.	Case No. 97-5736 HLH (CWx) **STIPULATION OF DISMISSAL OF DEFENDANT FELCOR/LAX HOLDINGS, L.P. WITH PREJUDICE AND [PROPOSED] ORDER THEREON** (Filed Oct. 6, 1999)

FELCOR/LAX HOLDINGS, L.P., a limited partnership; MINNESOTA HOTEL COMPANY, INC., a Corporation; ROBERT E. WOOLLEY, an individual, and DOES 1 through 100, inclusive,	)
Defendants.	)

It is hereby stipulated by and between the parties to this action through their designated counsel that defendant FelCor/LAX Holdings, L.P. be and hereby is dismissed with prejudice pursuant to Federal Rules of Civil Procedure Rule 41(a)(1). Each party shall bear his, her or its costs of suit and fees.

DATED: July 27, 1999

JENKENS & GILCHRIST
JONATHAN SOLISH
JUDITH B. GITTERMAN

BY: /S/ Judith B. Gitterman
JUDITH B. GITTERMAN
Attorneys for Defendant,
FELCOR/LAX
HOLDINGS, L.P.

DATED: August 4, 1999

LAW OFFICES OF
MARK T. YOUNG

BY: /s/ Mark T. Young
MARK T. YOUNG
Attorneys for Plaintiff,
HUNTINGTON BANKS OF
MICHIGAN

ORDER

IT IS SO ORDERED,

DATED: Oct. 6, 1999

/s/ Harry L. Hupp
DISTRICT COURT
JUDGE

11 U.S.C. § 1125. Postpetition disclosure and solicitation

(a) In this section –

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) "investor typical of holders of claims or interests of the relevant class" means investor having –

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title [11 USCS §§ 101 et seq.] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a

valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title [11 USCS §§ 101 et seq.], or that participates, in good faith and in compliance with the applicable provisions of this title [11 USCS §§ 101 et seq.], in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

(f) Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business –

(1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

(2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and

(3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.

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11 U.S.C. § 1144. Revocation of an order of confirmation

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall –

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

F.R.Civ.P. Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

F.R.Civ.P. Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.